SUPREME COURT, U.S.
LIBRARY

Office - Supreme Court, U. S.
FILED
AUG 14 1952
HAROLD B. WILLEY
CLERK

LIBRARY
SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 97

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THOMAS W. DANT, ET AL., Co-Partners d/b/a DANT & RUSSELL, LTD., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

R. S. SMETHURST
R. S. HASLAM
Washington, D. C.

JOHN T. CASEY
R. E. KRIESIEN
CASEY, KRIESIEN & PALMER
Portland, Oregon
Counsel for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Subject Index

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statute Involved	1
Statement	1
Reasons for Denial of Petition	2
Argument:	
(1) The Circuit Court of Appeals has properly construed the plain language of Section 9 (h) of the Act	2
(A) Statutory Construction of Section 9 (h)	2
(B) Legislative History and Congressional Intent re Sections 9 (f), (g) and (h)	3
(C) National Labor Relations Board Formal Construction of Section 9 (h) and Requirements of Administrative Procedure Act	9
(D) Judicial Determinations re Section 9 (h)	12
(2) The question presented by the Petition has been settled by this Court, and there is no conflict between the decision of the lower Court and the decisions of this Court	21
Conclusion	22

TABLE OF CASES, TEXT BOOKS AND STATUTES CITED

Decisions

N.L.R.B. v. The American Thread Company—F. (2d)	19
N.L.R.B. v. J. I. Case Company, No. 14218	21
N.L.R.B. v. Clark Shoe Co. (1951) 189 F. (2d) 731	21
N.L.R.B. v. Highland Park Mfg. Co., 341 U. S. 322	12, 19
N.L.R.B. v. Highland Park Mfg. Co., 184 F. (2d) 98	14, 16, 18

Page

N.L.R.B. v. Nina Dye Works, Inc., — F. (2d) —, 30 LRRM 2456 17
In re Northern Virginia Broadcasters, Inc., 75 N.L.R.B. 11 ..... 6, 14
N.L.R.B. v. Postex Cotton Mills, 181 F. (2d) 919 ..... 14, 17, 19, 20
Communications Association v. Douds, 339 U. S. 382 .. 16
Matter of Isaac Andrews, 87 N.L.R.B. No. 62 (1949) .. 10
West Texas Utilities Co. v. N.L.R.B., 184 F. (2d) 629 ..... 14, 15

TEXT BOOKS

American Jurisprudence—Statutes—Secs. 385 and 359 4

STATUTES AND RULES

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. Sec. 1001, et seq. 11
National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Supp. IV, Secs. 151 et seq. 4, 5
Section 9 (f) 4, 5, 6, 9
Section 9 (g) 4, 5, 6, 9
Section 9 (h) 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22
Public Law #189, 82nd Congress, First Session Ch. 354 ..... 7, 8
N.L.R.B. Rules and Regulations—Series 5, Sec. 203.13 9
N.L.R.B. Rules and Regulations—Series 6, Sec. 102.13 10

MISCELLANEOUS

Our New National Labor Policy, Funk & Wagnalls Co. pg. 162, 163 ..... 6, 19
Congressional Record
Vol. 93, pg. 3955 5
Vol. 93, pg. 6603 5
Vol. 93, pg. 6540 6
Vol. 93, pg. 7002 7
Vol. 96, pg. 6955 7
Vol. 97, pg. 1046—House Report #1082 ..... 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 97

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

THOMAS W. DANT, ET AL., Co-Partners d/b/a DANT & RUSSELL, LTD., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 195 F. (2d) 299.

JURISDICTION

As stated by Petitioner.

QUESTION PRESENTED

As stated by Petitioner.

STATUTE INVOLVED

As stated by Petitioner and presented in Appendix A of Petitioner's Brief.

STATEMENT

As stated by Petitioner.

REASONS FOR DENIAL OF PETITION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied for the reasons that:

(1) The Circuit Court of Appeals has properly construed the language and intent of Section 9 (h) of the Act;

(2) The question presented by the Petition is not an important question of Federal law which has not been, but should be settled by this Court;

(3) There is no conflict between the decision of the lower Court in the instant case and decisions on the subject presented by the Petition by other United States Circuit Courts of Appeal;

(4) The question presented by the Petition is not one where the Circuit Court of Appeals has decided a Federal question in conflict with the applicable decisions of this Court.

ARGUMENT

(1) The Circuit Court of Appeals Has Properly Construed the Plain Language and Intent of Section 9 (h) of the Act.

(A) Statutory construction of Section 9 (h).

The operative portion of Section 9 (h) relative to unfair labor practices reads:

> "* * * no complaint shall be issued *pursuant to a charge* made by a labor organization under subsection (b) of Section 10, unless there is *on file* with the Board an affidavit executed *contemporaneously* or within the preceding twelve month period by each officer of such labor organization, and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party * * *." (Emphasis added)

Respondents respectfully urge that any fair analysis of Section 9 (h), compels the conclusion that compliance therewith must be effectuated contemporaneously with the filing

of the charge or within the preceding twelve month period. To adopt a contrary interpretation, as does the Petitioner, would

(a) Require or promote the use of impractical, expensive, and wasteful procedures entailing a thorough investigation and processing of all charges filed by non-complying unions, without any requirement, or even assurance that the charging union would ever come into compliance, and thereby empower the Board to further proceed, in proper cases. A necessary corollary of such an interpretation is that non-complying unions could dictate commencement of such procedures, and then aid or prevent consummation of them, as their own desires or caprice might dictate.

(b) Compel a complete disregard of the conflict between

(1) an alleged right to execute the non-Communist affidavits *contemporaneously* with the issuance of the complaint, and

(2) the statutory requirement that the non-Communist affidavits must already be "*on file*" at the time of the issuance of the complaint.

(c) Require approval of an arrangement or political alliance between Governmental representatives, and the leaders of noncomplying unions which would thwart the purposes of the Act.

Respondents respectfully submit that there is no provision in the Act to support a squandering of Board funds on possible "dead end" investigations, as would of necessity flow from Petitioner's interpretation of Section 9 (h); that nothing in Section 9 (h) supports the impractical construction that Petitioner attaches to the word "contemporaneously" as used therein; and that the purposes of the Act would be thwarted by adoption of the Petitioner's interpretation of Section 9 (h).

Respondents contend that the Board's argument as to the construction of Section 9 (h) disregards the rule of statutory construction that significance and effect should be

accorded every word and phrase of an Act; *and* that the Petitioner's attempt to negative or read out of the Act the words "pursuant to a charge" is abortive, and does violence to the rule of construction, found clearly stated in 50 Am. Jur. Statute Sections 358 and 359, pages 362-365, as follows:

> "Indeed, it is a cardinal rule of statutory construction that significance and effect should, if possible, without destroying the sense or effect of the law, be accorded every part of the Act, including every section, paragraph, sentence, clause, phrase, and word. Under this rule, that construction is favored which will render every word operative, rather than one which makes some words idle and negatory.
>
> "It should not be presumed that any provision of a statute is redundant. To the contrary, it is to be presumed that one paragraph or word of a statute is not a needless repetition of another, and Courts should hesitate in ascribing careless and needless tautology to the law making body. Hence a construction will be avoided which would render a part of a statute superfluous, or which would give to a particular word or phrase the same meaning as the word or phrase preceding it, so that the latter adds nothing to the statute."

Respondents respectfully submit that the language of Section 9 (h) clearly establishes the requirement that the charging union be in compliance therewith at the *time of the filing of the charge*. Otherwise the charge is invalid and the Board is precluded from processing it.

(B) Legislative history and congressional intent re Sections 9 (f), (g) and (h).

Petitioner contends that the interpretation of Section 9 (h) made by the Court below does "violence to the manifest intention of Congress * * *," (Petition, page 6). It is significant to note, however, that the petitioner avoids consideration of all the legislative history preceding enactment of Sections 9 (f), (g) and (h) of the National Labor Rela-

tions Act, as amended, (61 Stat. 136, 29 U.S.C. Supp. IV, 141 et seq.) in its attempt to establish "Congressional intent."

Respondents contend that the legislative history establishes beyond question that it was *the Congressional intent* that compliance with the requirements of Section 9 (h) must be a *prerequisite* to the filing of a valid *charge.*

The House Report on H. R. 3020 states:

> "Section 9 (f) of the Senate amendment required labor organizations to file certain information and financial reports with the Secretary of Labor in order *to be eligible* for certification *or have charges processed* in their behalf.
>
> "The Conference Agreement (Section 9 (f) and (g)) adopts the provisions of the Senate amendment with three changes therein. First the filing of the information and reports is made a *condition of eligibility* for requesting a Union Shop Election, in addition to *eligibility for* filing petitions for representation, and *eligibility for making charges* * * *." (Emphasis added.)

Senator Taft, co-author of the Act, as amended, during Congressional debates on subsections (f) and (g) of Section 9, stated at 93 Congressional Record 3955, as follows:

> "Mr. President the bill provides that Unions must file financial reports on forms certified by the Secretary of Labor * * *.
>
> "The filing of such reports is a condition of certification as a bargaining agent under the law, and is also *a condition of the right to file any charges under the National Labor Relations Act.*" (Emphasis added.)

Senator Taft reiterated the same Congressional intent at 93 Congressional Record 6602, when he said:

> "Subsection 9 (f) and Subsection 9 (g) requiring that labor organizations *as a condition precedent to* be recognized as representatives under Section 9 or *being permitted to file charges under Section 10* must file certain information with the Secretary of Labor and furnish financial reports to their members, differs

from the corresponding subsection in the Senate amendments only with respect to 9 (f), (sic)."

Section 9 (h) was enacted under the same and identical Congressional theory or intent as Sections 9 (f) and (g). This fact is established by statements of the Act's authors.

Congressman Hartley said, on June 4, 1947, at 93 Congressional Record 6540, that:

> "The Bill further *prohibits labor organizations from invoking the processes of the Act* unless all of the officers file affidavits with the Board that they are not members of the Communist party or other subversive organizations." (Emphasis added.)[1]

---

[1] In a subsequent statement, Congressman Hartley reemphasized that it was the intention of the Congress that the processes of the Board could not be started by non-complying unions. Shortly after the Board's decision in the *Northern Virginia Broadcasters, Inc.* case, (1947) 75 NLRB 11, he had published a book entitled "Our New National Labor Policy", Funk and Wagnalls Company. Therein, at pp. 162 and 163, he said:

> "Lest there be any doubt as to what we meant when we wrote that section, I want to put down here exactly what I had in mind and also report that not a single member of the House Labor Committee or the Joint House Senate Conference Committee ever indicated that it meant anything else.
>
> "I meant that no Local Union could petition for an election *or file an unfair labor practice charge*, unless the officer of that Local and the officers of the international union and the officers of whichever of the two major labor organizations the international was affiliated with, had filed non-Communist affidavits * * *.
>
> "The National Labor Relations Board ruled differently. In a decision remarkable for its twisted logic, the Board held that the officials of the AFL and CIO national officers were not officers of an 'affiliated organization.' As a result, the two national labor organizations we wanted most to reach were beyond reach of the law we wrote for that purpose. * * *
>
> "*I would not be so concerned over this particular decision if it were not for the precedent it established for circumventing the clear intent of Congress.*" (Emphasis added.)

On June 12, 1947, Senator Taft, in describing the effect of Section 9 (h), made the following statement:

> "This provision, making the filing of affidavits with respect to Communist Party affiliation by its officers *a condition precedent to the use of the processes of the Board* has been criticized as creating endless delays." (Emphasis added). 93 Cong. Rec. 7002.[2]

In opposition to these clear declarations of Congressional intent respecting Section 9 (h), the Petitioner's sole representation of apparent Congressional intent is predicated on the failure of Congress to incorporate in a bill subsequently enacted as Pub. Law 189, 82nd Cong. 1st Session, certain recommendations of the Joint Committee of Labor and Management. While these recommendations dealt in part with the filing requirements under Section 9 (h) of the Act, they were primarily concerned with a money saving proposal resulting from problems confronting the Board as a result of its erroneous decisions concerning "labor organizations" affected by Sections 9 (f), (g) and (h) of the Act. This is made clear by House Report No. 1082 (82nd Congress, First Session, page 2) describing the bill.

That report reads in part as follows:

> "The purposes of the Bill are (1) to resolve problems arising from a recent supreme Court decision, National Labor Relations Board vs. Highland Park Manufacturing Company and * * *."
>
> "It is estimated that the Bill will achieve economies in excess of $1,000,000.00. The General Counsel of the

---

[2] Senator Ellender, one of the Senate conferees who had signed the Conference Report on the Act, during a 1950 debate on an N.L.R.B. reorganization plan submitted to Congress stated that:

> "One of the major provisions in the Taft-Hartley Act is the Section which *denies the facilities of the Labor Board* to labor organizations or any organizations affiliated with them *unless all the officers file affidavits* disclaiming membership in or sympathy with the Communist Party." (Emphasis added.) 96 Cong. Rec. 6955, May 11, 1950.

> National Labor Relations Board has stated that to repeat the election affected by the Highland Park decision would involve polling approximately 1,470,000 voters in Union Shop cases at an estimated cost of $735,000.00 and approximately 370,000 voters in representation cases at an estimated cost of $135,500.00. In addition the General Counsel estimates that approximately $200,000.00 might have to be spent on the conduct of investigations and litigations in complaint cases which might arise from upsetting existing certificates. The funds for these purposes are not provided in the Board's current appropriation * * *."

From the above quotation, it is obvious that Congress did not intend to amend Section 9 of the Act by Pub. Law 189, 82nd Congress, First Session. By that Act the Congress merely intended to prevent what it regarded as unnecessary expenditures in Government.

We respectfully submit that it is patently clear from the legislative history of Section 9 (h) of the Act that the *Congress intended* that filing of non-communist affidavits had to precede or accompany *a charge* filed by a Union: otherwise the charge is invalid and that filing of such affidavits thereafter does not satisfy the Congressional intent.[3]

---

[3] The petition in this case further reveals that the Board is continuing to disregard Congressional intent. It states that the General Counsel has authorized reissuance of complaints which had to be dismissed as a result of this Court's decision in the *Highland Park* case, *ibid.*

See House Rept. 1082, 82nd Congress, First Session, which accompanied the bill enacted as Pub. Law 189, 82nd Congress, First Session, wherein it is said:

> "It is not intended that this Bill, in itself shall create any authority to reinstitute any unfair labor practice proceeding which has heretofore been dismissed by the Court, or by the National Labor Relations Board on the authority of the Highland Park case."

(C) The National Labor Relations Board's formal construction of Section 9 (h) of the Act, and the requirements of the Administrative Procedure Act establish that the petition here must be denied.

Respondents respectfully submit that at all times heretofore, and from the very inception of the Act, the National Labor Relations Board itself has officially interpreted the wording of the Act, and the intent of Congress, in a manner identical to that presently advocated by Respondents.

In this connection Section 203.13 (b) of Board Rules and Regulations, Series 5, effective August 23, 1947, provided as follows:

> "203.13. Compliance with Section 9 (f), (g) and (h) of the Act: * * * (b) for the purpose of these Rules and Regulations, compliance with Section 9 (h) of the Act means that a national and an international labor organization has on file with the General Counsel in Washington, D. C., and a local labor organization has on file with the Regional Director in the region in which the proceeding is pending
>
> (1) an affidavit by an authorized representative of the labor organization, under oath, *executed contemporaneously with the charge, or within the preceding twelve month period*, listing the titles of all officers * * *.
>
> (2) an affidavit by each officer referred to in paragraph (1) above, executed *contemporaneously with the charge, or within the preceding twelve month period*, stating that he is not a member of the Communist Party * * *." (Emphasis added.)

The same requirements have been set out in the Board's Rules and Regulations since the adoption of Section 203.13

(b), *supra*, and are currently found in Section 102.13 of Rules and Regulations, Series 6, effective March 1, 1951.[4]

Further, on at least one occasion the Board apparently sought to follow its own Rules in a case decision. In the *Matter of Isaac Andrews*, 87 N.L.R.B. No. 62 (1949), the Board said:

> "* * * By Section 9 (h) Congress hoped to purge Communists from the labor movement * * *.
>
> "* * * Nor do we believe that the Union's subsequent compliance cured the effects of it's non-compliance which existed at the time of its request to bargain. *The*

---

[4] The current Rules read as follows:

"Sec. 102.13 *Compliance with Section 9 (f), (g), and (h) of the act.*—

"(b) For the purpose of these Rules and Regulations, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

"(1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

"(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

*Act does not state, nor may it be implied that the Board should give retroactive effect to the Union's compliance. * * * We do not believe that Congress intended the Board to extend retroactive protection to those organizations, which have thus thwarted an established public policy.*" (Emphasis added).

In light of the foregoing, Respondents submit that the Board's current position is untenable. As shown, the Board's own Rules require it to follow the construction of Section 9 (h) of the Act which was adopted by the Court below.

In addition, the Court's attention is respectfully directed to the fact, that by refusing to follow its own rules and thus entertaining invalid charges filed by non-complying unions, the Board has sought to make a *mockery* of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. Sec. 1001, *et seq.*

The Administrative Procedure Act, *supra*, not only requires that rules of an administrative agency such as N. L. R. B. must be published; that Act also contemplates that such rules must be followed by the agency concerned. Otherwise, the promulgation and publication of "rules" are meaningless acts.

In the instant case, and in other cases hereinafter identified, the Board has wholly disregarded its published "Rules" which were presumably designed to guide and apprise the "public" of rights and obligations under the Act. Instead, the Board in these cases has used a *rule of convenience* in order to vest in non-complying unions, and in the Board, rights which Section 9 (h) explicitly denied. Also, by using this "rule of convenience" in these cases, the Board has sought to apply sanctions contrary to the Administrative Procedure Act, *supra*, which are not authorized by law, and which are outside the jurisdiction of the Board delegated by law.

It is the respectful contention of the Respondents that any and every order of the Board not promulgated in ac-

cordance with requirements of the Administrative Procedure Act, *supra*, is invalid *ab initio* and must be denied enforcement. It is the further contention of Respondents that the Board violated the Administrative Procedure Act, *supra*, in failing to follow its own published Rules which conformed with and were authorized by law, and in following an unlawful "rule of convenience" to attain objectives which the National Labor Relations Act forbids.

For these additional reasons, Respondents respectfully urge that the petition in the instant case be denied.

(D) Judicial determinations respecting Section 9 (h) are not at variance with the Court of Appeals decision in the instant case, but are fully in accord with that decision.

On many occasions the Federal courts have considered and decided the application of Section 9 (h) in particular factual situations. Until recently, however, only a few of the decisions have been concerned *primarily* with the specific problem before the Court in the instant case. It is the respectful contention of Respondents, nevertheless, that the decision of this Court in the case of *National Labor Relations Board* v. *Highland Park Manufacturing Company*, 341 U. S. 322, 95 L. ed. 969 has effectively settled the question sought to be raised by the Board's petition herein. Decisions of other Circuit Courts of Appeal fully support this view.

In the *Highland Park* case, this Court was confronted with the specific *question of whether an order* of the National Labor Relations Board *was valid and could be enforced since it was based upon charges filed by an affiliate of the C. I. O. whose international officers had not then complied with Section 9 (h)*.

This Court held without equivocation that a Board order based upon such charge was invalid.

In the course of its opinion, the Court emphasized that the Board's order had been challenged on the ground that

the C. I. O. affiliate was *disabled from filing a valid charge,* and that the Board was precluded by Section 9 (h) from entertaining the charge and from entering an order pursuant to a formal Board complaint based on the charge.

The Court said:

> "The order was challenged upon the grounds, among others, that the failure of the C. I. O. officers to file non-Communist affidavits *disabled its affiliate, the Textile Workers Union,* and the Board could not entertain *their complaint* and enter the order." (Emphasis added).

As the Court noted, the challenge to the validity of the Board's order was directed, in basic part, to the validity of the very charge (called "complaint" in the decision) *which started and was an integral part* of the Board's proceeding.

It might be noted here that the Board has frequently used the technical term "charge" to identify *complaints* from unions or otherwise that unfair labor practices had been or were being committed. Further, the Board has designated as a "complaint" the formal *charges* prepared by the General Counsel alleging that unfair labor practices had been or were being committed. In view of these Board usages, the Board now seeks to convince this Court that the question involved in the instant Petition is novel.

Respondents contend that the decision of this Court in the *Highland Park* case establishes beyond question that an affiliate of a non-complying national or international union cannot file a valid *charge* even though the Court used the term "complaint" to identify a "charge" as the Board has used that term.

In the preceding quotation from the *Highland Park* decision, it is clear that this Court, in using the term "complaint", referred to the "complaint" [charge] of the union; not the *formal complaint* of the Board, which *might constitute* a "complaint" in the Board's restricted terminol-

ogy. Certainly, if the Board is precluded from entertaining a "complaint" [charge] because of the disability of the filing union, it cannot hide behind a technical definition of "complaint" versus "charge" in order to avoid this statutory prohibition.

That this Court was not seeking to follow the restricted terminology of the Board in arriving at its *Highland Park* decision is supported by the following quotation from its decision:

> "The general counsel of the Board had ruled that the Board could not entertain a *complaint* under these circumstances but the Board, with one member dissenting, overruled him, for reasons stated in Re Northern Virginia Broadcasters, Inc. 75 NLRB 11. The Court of Appeals for the District of Columbia Circuit reached the same conclusion as the Board in West Texas Utilities Co. v. National Labor Relations Board 87 App. DC —, 184 F 2d 233. The Court of Appeals for the Fourth Circuit in this case, 184 F 2d 98, and the Court of Appeals for the Fifth Circuit, in the National Labor Relations Board v. Postex Cotton Mills, Inc. 181 F 2d 919, arrived at a contrary result, *holding that the Board could not entertain the complaint.* The conflicting results are each so well-considered and so thoroughly documented in opinions already appearing in the books that little could be added to either. We agree with the conclusions of the Fourth and Fifth Circuits." (Emphasis added).

The Court's attention is respectfully directed to the fact that its decision in the *Highland Park* case, *supra,* explicitly overruled the decision of the United States Court of Appeals for the District of Columbia in the case of *West Texas Utilities* v. *National Labor Relations Board,* 184 F (2d) 233, wherein that Court erroneously concluded that compliance by officers of IBEW when the charge was filed removed the *statutory disability* attached to it as an affiliate of the American Federation of Labor because the officers

of the AFL were not then in compliance with Section 9 (h).[5] Instead, the Court expressly adopted the conclusions of the U. S. Courts of Appeal in *N. L. R. B.* v. *Highland Park Manufacturing Co.*, C. A. 4, 1950, 184 F (2d) 98, and in *NLRB* v. *Postex Cotton Mills*, C. A. 5, 1950, 181 F (2d) 919.

By this decision in agreement with the conclusions of the Fourth and Fifth Circuit Courts of Appeal, this Court ruled, it is submitted, that a *valid charge* cannot be filed by an affiliate of a non-complying "labor organization", and that the Board is precluded by Section 9 (h) of the Act from entertaining or processing a charge received from an affiliate of a non-complying "labor organization". This is established by the Court's summation of its decision when it said:

> *"It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid.* We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their

---

[5] The error of the U. S. Court of Appeals for the District of Columbia in the *West Texas Utilities* case, *supra*, as to the necessity for compliance by the A.F.L. did not affect that Court's recognition of the requirements of Section 9 (h) that a union cannot initiate Board proceedings unless non-communist affidavits are filed contemporaneously with the *union's charge*, or within the preceding 12-month period. That Court said:

> ". . . the act's only sanction for non-compliance is denial of Board facilities. Thus, if an unfair labor practice is committed by an employer, the union *may not seek Board aid* to compel him to cease and desist *unless there is on file with the Board an affidavit executed contemporaneously* or within the preceding twelve month period . . ." (Emphasis added.)

enforcement powers to an administrative tribual." (Emphasis added).[6]

Earlier in this brief, attention has been called to the fact that the Board itself, in its Rules and Regulations has construed the Act as requiring the execution of non-communist affidavits "*contemporaneously with the charge* . . . or within the preceding twelve month period." These Rules, we submit, properly interpret Section 9 (h) of the Act, and we further submit that it "would be strange indeed if the courts were compelled to enforce . . . an order which could only result from proceedings that . . . the Board was forbidden to conduct" (a) under the statute, (b) under its own Rules and Regulations, and (c) under the decision of this Court in the *Highland Park* case, *supra.*

Clearly the Court of Appeals for the Fourth Circuit in *NLRB* v. *Highland Park, supra,* determined that compliance with the requirements of Section 9 (h) must exist at the time the charging union seeks to invoke the Board's assistance.

That Court said:

> "We find no ambiguity in the language of the governing statute. On the contrary it provides as clearly as language can that *the power of the Board may not be invoked by a labor organization unless there is on file the affidavit which the statute requires* * * *

---

[6] In an earlier decision of this Court, Mr. Justice Frankfurter made it clear that Section 9 (h) precludes non-complying unions from utilizing the Act's procedures. In *Communications Association* v. *Douds,* 339 U. S. 382, at p. 416, he stated:

> "It must suffice for me to say that, *the judgment of Congress* that trade unions which are guided by officers who are committed by ties of membership to the Communist Party *must forego the advantage of the Labor Management Relations Act* is reasonably related to the accomplishment of the purposes which Congress constitutionally had a right to pursue." (Emphasis added.)

"We see no reason to emasculate the statute by resorting to forced rules of interpretation when its language is perfectly clear and gives unqualified support to the purpose which Congress had in mind." (Emphasis added).

The Fifth Circuit Court of Appeals in *NLRB* v. *Postex Cotton Mills, supra,* reached the same conclusion. It stated:

"The other (National Labor Relations Act) imposes a restriction upon an agency provided and maintained by the government and directs that the benefits provided *shall be withheld from those who do not comply.*

"* * * The provision is pertinent though, as illustrative that Sec. 9 (h) evidences no novelty in expression of congressional intent to prevent any governmental department *from being used, directly or indirectly,* to promote or sustain any organization or person who believes in the overthrow of the government of the United States by unconstitutional means." (Emphasis added)

The Respondents' construction of this Court's decision in the *Highland Park* case, *supra,* is strongly supported by the decision of the U. S. Court of Appeals for the Third Circuit in the case of *NLRB* v. *Nina Dye Works, Inc.,* July 24, 1952, — F 2d —, 30 LRRM 2456.

In the *Nina Dye* case, the Court of Appeals refused to enforce an NLRB order because the C. I. O. had not filed the documents and affidavits required by Section 9 (f), (g) and (h) of the Act until after the unfair labor practice charges were filed by a complying affiliate. After noting that the Board's action *in entertaining the charge and issuing a complaint* was "directly contrary to its own regulations", the Court of Appeals said:

"In the one reported United States Court of Appeals decision squarely in point, the Ninth Circuit held that where the necessary non-Communist affidavits of the officers of the parent national labor organization were not on file when the particular charge was made by the

affiliated local union, '****the Board was not empowered to entertain the charge or to issue the complaint or the order.' National Labor Relations Board v. Dant, et al., 195 F 2d 299, 300. While the exact situation has not been passed upon to date by the Supreme Court, that Court in National Labor Relations Board v. Highland Park Manufacturing Co., 341 U. S. 322, strongly upheld the provision of Section 9 (h) calling for the officers of the national union with whom the charging local was affiliated to file non-Communist affidavits.

"The Fourth Circuit decision which had been affirmed in the above referred to opinion stated, 'we find no ambiguity in the language of the governing statute. On the contrary it provides as clearly as language can that *the power of the Board may not be invoked* by a labor organization unless there is on file the affidavits which the statute requires executed***.' 184 F 2d 98, 99. (Emphasis supplied) And see National Labor Relations Board v. Postex Cotton Mills, Inc., 5 Cir., 181 F 2d 919.

"We find no real support for the Board's present position in the citations submitted on behalf of that body. Nor do we think that there is anything helpful, as is urged, to the Board's attempted construction of 9 (h) in Senator Taft's 'Supplemental Analysis of Labor Bill (Taft-Hartley Act) as passed.' Legislative History of the Labor Management Relations Act, 1947, Vol. II. p. 1625. The Senator did say that the purpose of 9 (h) was to make the filing of the non-Communist affidavits '**** a condition precedent to use of the processes of the Board***' but it can hardly be inferred from this that in the Senator's opinion the charge, without which no complaint can be issued, is not to be considered part of the processes of the Board. Congressman Hartley, jointly responsible with Senator Taft for the 1947 Labor Management Relations Act, left no doubt as to the meaning of 9 (h) when he said:

> " 'Lest there be any doubt as to what we meant when we wrote that Section, I want to put down here exactly what I had in mind and also report that not a single member of the House Labor Committee or the Joint House-Senate Conference Committee ever indicated that it meant anything else.

"'I meant that no local union could petition for an election or file an unfair labor practice charge unless the officers of that local and the officers of the international union and the officers of whichever of the two major labor organizations the international was affiliated with, had filed non-Communist affidavits.' Hartley: 'Our New National Labor Policy', Funk & Wagnalls Company, page 162.' "

"From the wording of the statute, the construction placed upon it by the Board in its Regulation 102.13, its legislative history and the trend of the pertinent decisions, we are entirely satisfied that the Dant case was correctly decided. Therefore we hold that in this matter the Board was without jurisdiction to issue its complaint."

The U. S. Court of Appeals for the Fifth Circuit in *NLRB* v. *The American Thread Company*, — F (2d) —, July 31, 1952, reached the same conclusion under similar facts.

That Court said:

"In resisting enforcement of the order respondent urges that enforcement should be denied because at the time the original and amended charges were filed against it the Congress of Industrial Organizations had not complied with Section 9 (h) of the Act, 29 U. S. C. A. Sec. 159 (h) and that therefore the complaint issued on the basis of such charges was issued in violation of that section of the Act. The Congress of Industrial Organizations did comply with Section 9 (h) supra, in December, 1949, before the complaint was issued.[1] The respondent contends that such compliance did not have the retroactive effect of validating the charges or empowering the Board to entertain them, or to issue the complaint or order. NLRB v. Dant, 195 F 2d 299.

"In NLRB v. Dant, *supra*, the Court of Appeals for the Ninth Circuit, under a similar factual situation, held that a charge made by a labor organization at a

---

"[1] NLRB v. Highland Park Co. 341 U. S. 322; NLRB v. Postex Cotton Mills, 181 F 2d 919."

time when the Congress of Industrial Organizations, of which it was an affiliate, was not in compliance with subsection (h) of Section 9, *supra*, could not be made the predicate for the issuance of a complaint by the Board, although the Congress of Industrial Organizations complied with the requirements of that subsection prior to the date of issuance of the complaint. The Board contends that the decision is unprecedented and that this construction is contrary to a 'spontaneous textual reading' of the statute. In NLRB v. Postex Cotton Mills, 181 F 2d 919, this Court had occasion to consider the purpose of Congress in enacting the statute in question and concluded that it was with the intent to 'wholly eradicate and bar from leadership in the American Labor movement at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government'.

"The Board argues that the statute should be construed to place a limitation upon its power to issue a complaint in cases where a charge has been filed by a non-complying labor organization and not to disqualify a non-complying labor organization from filing charges. But the broad purpose of the Act covers both situations. *The statute withdraws from its creature, the Board, the power to employ its processes in aid of a non-complying union, and likewise evidences the clear purpose to disentitle and exclude such non-complying union from setting in motion the processes of the Board.* Both of these results are necessary to insure complete effectuation of the Congressional intent. *Congress intended to remove from the protection of the Act those labor organizations which could not, or would not, bring themselves into compliance and thereby withheld from such organizations not only the processes of the Board, but also the benefits of the Act.* NLRB v. Postex Cotton Mills, supra; NLRB v. Case Co. 189 F 2d 599. Inasmuch as the charges were filed at a time when the union was not in compliance and since the subsequent compliance had no retroactive effect to give legal substance to the charges, to empower the Board to issue the complaint, the order of the Board is unauthorized

and cannot be enforced. NLRB v. Dant, *supra*, and cases cited." (Emphasis added).[7]

In the statements of this Court, and the statements of the various Circuit Courts of Appeal hereinabove quoted, there is no deviation from the proposition that Section 9 (h) requires that non-communist affidavits must be on file before a union may "invoke" the processes of the Board. There can be no question but that the filing of a charge is designed to invoke the processes of the Act; in fact, the filing of such a charge constitutes the first step of such processes. As this Court emphasized in the *Highland Park* decision, *supra, if the charge is invalid because of non-compliance, then all the processes are invalid, and any Board order is likewise invalid.*

This interpretation of Section 9 (h) was adopted by the Ninth Circuit Court of Appeals in the instant case, and has since been adopted by other United States Courts of Appeal as hereinabove shown.

In view of the language of that Section, 9 (h), its undisputed legislative history, the construction of the Section in the Rules and Regulations of the National Labor Relations Board, and the earlier decisions of this Court and in various Circuit Courts of Appeal, we submit that no other interpretation of Section 9 (h) is sustainable.

(2) The Question Presented by the Petition Has Been Settled by This Court, and There is No Conflict Between the Decision of the Lower Court and the Decisions of This Court.

The question presented by the petition in this case has already been settled by this Court in its decision in the *Highland Park* case, *supra.*

---

[7] For additional decisions holding that compliance cannot be made retroactive, and validate a charge filed by a non-complying union, see *N.L.R.B.* v. *Clark Shoe Co.*, C. A. 1, (1951), 189 F. (2d) 731 at 732, and *N.L.R.B.* v. *J. I. Case Co.*, C. A. 8, (1951), 189 F. (2d) 599.

It is absolutely clear from the Court's decision in that case that any union which is affiliated with a non-complying national or international union is "disabled" by Section 9 (h) of the Act from filing a valid charge. Further, the decision establishes that even though the Board may entertain and process such an invalid charge, that all of its proceedings are invalid and that any order based upon such invalid proceedings is invalid and unenforceable.

CONCLUSION

In conclusion, Respondents respectfully submit that the Petition for Writ of Certiorari in this case should be denied for the reasons that

(1) The Circuit Court of Appeals has properly construed the language of Section 9 (h) in the instant case;

(2) The decision of the Circuit Court of Appeals is fully supported by the legislative history of Section 9 (h);

(3) The Board's action in the instant case was unauthorized by the National Labor Relations Act, as amended, *supra*, and was taken in direct violation of the Administrative Procedure Act;

(4) The decision of the lower Court conforms with the decision of this Court in the *Highland Park* case, *supra*, and is in complete harmony with decisions of other circuit courts of appeal, and

(5) The questions raised by the Petition have already been settled by this Court in its *Highland Park* decision, *supra*.

Respectfully submitted,

JOHN T. CASEY
R. E. KRIESIEN
CASEY, KRIESIEN & PALMER
Portland, Oregon

R. S. SMETHURST
R. S. HASLAM
Washington, D. C.
Counsel for Respondents